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SUPREME COURT, U.S.

No. 80-6749

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GARY X. NELSON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF THE STATE OF GEORGIA

REPLY OF PETITIONER GARY X. NELSON

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REPLY OF PETITIONER GARY X. NELSON

Petitioner Gary X. Nelson submits this reply to respondent's brief in opposition to his petition for a writ of certiorari.

PRELIMINARY STATEMENT

We regretfully find it necessary to correct several errors contained in respondent's statement of the facts. In an apparent attempt to bolster the testimony of Sabrina Williams, respondent claims that the police interviewed her on February 19, 1978, the day the victim disappeared, before initiating their search for the victim. Respondent further suggests that during

this February 19 interview -- which never occurred -- Sabrina told the police that she had seen the victim going into the yard of petitioner's house, noticed petitioner standing by the automobile on which he was working when the victim entered his backyard, and identified a photograph as representing the person she saw with the victim shortly before the victim disappeared. Respondent's Brief ("RB") at 4.

In fact, on the day that the victim disappeared Sabrina, who was then eight years old, told the victim's sister that she had not seen the victim that day. Tr 309-10. It was not until three days later, on February 22, that the police interviewed Sabrina for the first time. Her statements to the police at that time, and her subsequent statements, are summarized accurately in the Petition at 4-6. Here, we note only that Sabrina did not testify that she saw the victim going into the back yard of petitioner's house. Rather, she testified that the victim was going to what the victim referred to as her "uncle house" (sic), a house which Sabrina further identified as "Al's house" (TT 304-05), referring to Al Swinton, petitioner's one-time roommate.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER DEFENDANT WAS DENIED DUE PROCESS BY A CONVICTION ON INSUFFICIENT EVIDENCE

Respondent's perfunctory retort that the evidence was sufficient to find petitioner guilty beyond a resonable doubt, and its mechanical reliance on Jackson v. Virginia, 333 U.S. 307 (1979), gloss over the fatal constitutional deficiencies in the state's evidence outlined in the Petition at 14-28. The most

probative evidence connecting petitioner to the crimes was forensic: the semen sample taken from the victim's coat, which could have come from 44% of the population, including petitioner and perhaps Swinton; and the single hair taken from the victim's body, which could have come from at the very least 120 people in the county including petitioner and perhaps Swinton.

Moreover, as we pointed out in the Petition at 17-18 and 25-28, the prosecution introduced no evidence excluding the possibility that Swinton, petitioner's former roommate who also had access to the alleged murder weapon, had committed the crimes. The Georgia Supreme Court, authoritatively interpreting the Georgia circumstantial evidence statute as applied to the facts here, specifically held that "[i]n order for the state to prove its case against the appellant, it was necessary for the state to exclude the possibility that Swinton, who also had access to the murder weapon, could have committed the murder" and that "[t]he evidence introduced included proof that the hair found on the victim could have come from the appellant's arm, but could not have come from Swinton's arm." Nelson v. State, 247 Ga. 172, ___, 274 S.E. 2d 317, 323 (1981).

Respondent concedes that the Georgia Supreme Court was wrong in stating that Swinton had been excluded by evidence relating to hair samples. RB at 9. Nevertheless, respondent urges that petitioner's conviction may be sustained because: (1) the Georgia Supreme Court's authoritative interpretation of the Georgia statute is wrong; or (2) the state might have been able to exclude Swinton but for defense counsel's objection at trial.

We submit that the United States Constitution requires that this case be judged on the basis of the record developed below, not upon theories of "what might have been" had the courts and lawyers below acted differently. Graphic descriptions of the crime -- which we concede was a tragic and gruesome one -- cannot fill such gaps in the state's case.

Respondent cites no Georgia authority supporting its claim that the Georgia Supreme Court misconstrued the circumstantial evidence statute.* The plain fact is that the only evidence of record concerning the knife which the state claimed was the murder weapon related to a time when it was used at the residence where both Swinton and petitioner resided, and no evidence was presented that the knife remained in petitioner's possession after Swinton had moved out. For that reason, the Supreme Court of Georgia was compelled to conclude, as it did, that Swinton had to be excluded as a suspect if petitioner's conviction were to stand.**

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* Respondent urges that the fact that the jury found petitioner guilty necessarily establishes that Swinton's guilt was not a reasonable hypothesis that had to be excluded. This is a curious boot-strap argument by which judicial review of the sufficiency of the evidence would be relinquished to the jury, in disregard of Jackson v. Virginia.

** Respondent incorrectly asserts that Swinton could not have committed the crimes, because he moved out of the house he had been sharing with petitioner shortly before the crimes. Of course, there is no evidence that the victim was killed or assaulted in the house. Second, virtually the only evidence tending to connect the knife, and hence petitioner, to the crimes was the testimony of Swinton's girlfriend Patricia Brown. She testified that she saw the knife found near the body when she visited the house, while both Swinton and petitioner were living there. She further testified that she visited the house about one week before the crime to see Swinton, but did not see the knife in the house at that time. TT 347-50, 353-55. Thus given the record evidence it is as plausible that Swinton took the knife when he moved out of the house, as it is that the knife was in the house on the day of the crimes. Swinton was thus at least as strong a suspect as petitioner, having lived in the same house at the only time that the knife was placed in the house by the state's evidence, having befriended the neighborhood children through offers of candy, and having been known as "Uncle Al" by those children. TT 304, 319, 353-55.

Respondent's contention that the lack of evidence excluding Swinton was not raised below is specious. Petitioner attacked the sufficiency of the evidence at every opportunity below,* and all counsel and both courts below were acutely aware that the circumstantial evidence statute applied because of the nature of the state's proof.** Nor is there any basis for respondent's contention that petitioner cannot challenge the lack of evidence excluding Swinton, because petitioner's appointed counsel below questioned the admisssion of certain evidence concerning Swinton. RB at 11. At trial, during the direct examination of the state's expert hair analyst, defense counsel asked that the state lay a proper evidentiary foundation before introducing proof concerning the hair sample said to be Swinton's. No proof had yet been presented that the sample had been taken from Swinton, and the prosecutor voluntarily offered to wait until later in the trial to introduce evidence "to link up" the Swinton hair sample. The prosecutor then failed, through no fault of petitioner's, to introduce any evidence excluding Swinton. See

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* For challenges to the sufficiency of the evidence in the trial court, see Motion for a Directed Verdict, TT 515-22; Renewed Motion for a New Trial, R 62; Transcript of Proceedings on Petitioner's Motion for a New Trial (May 9, 1980) at 4-5. In the Georgia Supreme Court, see Appellant's Brief ¶¶ 1-3.

** As shown below, the prosecutor understood that he had to "negate" Swinton, and defense counsel quite properly sought to require that his adversary "turn square corners" in doing so. Moreover, the trial judge clearly understood his obligation to instruct the jury on the state's added burden because of the circumstantial evidence statute. We concede that the Georgia Supreme Court's error in misreading the record was not anticipated at trial, but submit that petitioner did present his claim in an appropriate fashion below, and that the issue was decided, in fact, by the Georgia Supreme Court. See Beck v. Alabama, 447 U.S. 625, 630 n.6 (1980); Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973); cf. Supreme Court Rules, Rule 21.1(a).

TT 340-41.* The fact that appointed counsel on appeal challenged the relevancy of the Swinton evidence did not and should not retroactively relieve the state of the burden of introducing sufficient evidence at trial to negate Swinton as a suspect. This the state failed to do, and ex post facto rationalizations cannot supply the essential evidence which the Georgia Supreme Court mistakenly "found" in the record.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER GEORGIA'S STATUTORY BASIS FOR IMPOSING DEATH HERE IS UNCONSTITUTIONALLY VAGUE OR OVERBROAD ON ITS FACTS OR AS APPLIED IN THIS CASE

Respondent's reliance on Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 101 S. Ct. 796 (1980), to sustain its claim that section (b) (7) [Ga. Code Ann. § 27-2534.1(b)(7)] is not unconstitutional on its face begs the question presented. In the petition we demonstrated that Hance itself is inconsistent

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* The following discussion occurred concerning the "Swinton" hair evidence:

> Q. All right, sir. Now, I show you an item marked State's Exhibit Number 23, that has been identified as the the known hair of one Alphonso Swinton --
> MR. McGLASSON: Your Honor, before we get into that, either remove the jury or have some connection made between that exhibit, which has not been tendered into evidence, and this case and this defendant, and I have yet to hear that name entered into this picture yet once.
> THE COURT: Do you intend to link this up?
> MR. RYAN: Yes, sir, at a later time - or I'll - - -
> MR. McGLASSON: I don't think the expert can testify as to the connection until such time as a link-up has been made.
> MR. RYAN: All right, we'll hold it out.
> THE COURT: All right.

TT 340-41.

with this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980), and that even if Hance represented a constitutional interpretation of the statute such instructions have never been given to Georgia juries. See Petition at 28-51.* The state does not even contest the latter point, although it seems to urge that unchannelled jury discretion is permitted so long as the Georgia Supreme Court has in mind a constitutional interpretation of the capital punishment statute when it reviews a capital case. See RB at 16, citing Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980). This contention was disposed of in the Petition at 53-55, which establishes that this Court's decisions require that clear, objective and specific standards guide the discretion of the sentencing body -- i.e., the jury in Georgia capital cases. Finally, the state provides no response to the troubling evidence (presented in the Petition at 45-51) that this vague and overboard statute is being employed with increasing frequency as the sole basis for Georgia death sentences.

Respondent also ignores petitioner's claims that section (b)(7) was unconstitutionally applied in this case. While correctly conceding that under Godfrey the jury must find that the evidence satisfies the first major component of section (b)(7) (that the murder was wantonly vile, horrible or inhuman) and at least one subpart of the second component (that the murder involved torture, depravity of mind, or an aggravated battery to the victim), respondent incorrectly asserts that the "jury found

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* Respondent asks this Court to concur in "any decent society's collective judgment that a child molestation-murder is a crime" that warrants the death penalty. RB at 15. The issue is not whether a child molestation-murder warrants the death penalty, but whether a jury may condemn a person to die in the absence of a clear and objective sentencing standard.

the evidence satisfied the first major component and all three of the sub-parts of the second component" [RB at 15 (emphasis added)], and that "the jury returned a full and proper finding of the Section (b)(7) circumstance" (RB at 16).* However, as pointed out in the Petition at 58-60, the trial court incorrectly instructed the jury to make a finding in the disjunctive under section (b)(7) (TT 677), and failed to charge that the jury must unanimously agree on the same one or more elements of section (b)(7). Since the jury did return a verdict in the disjunctive (TT 680-81), adequate appellate review of the petitioner's death sentence is impossible because there is no way of knowing whether the jury unanimously agreed upon the same element of section (b)(7).**

Similarly, respondent ignores the fact that although the jury was instructed that it could recommend mercy (see RB at 16), the trial court incorrectly charged the jury that such a recommendation had to be unanimous. If even a single juror had voted for mercy, petitioner could not have been sentenced to die. See Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976). The court's incorrect unanimity instructions unconstitutionally

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* Contrary to petitioner's claim that the state's evidence wholly failed to establish that section (b)(7) applied (see Petition at 55-57), respondent contends that the victim "slowly bled to death for approximately thirty minutes" (RB at 14). In fact, the state's pathologist testified that she bled to death "not long" after she was stabbed. TT 293. The prosecutor then asked, "Would you say within thiry minutes?" The pathologist replied, "It's really hard to estimate these things, probably impossible, but I would -- my guess would be within about thirty minutes, yes." Id.

** See United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (conviction reversed where court gave erroneous unanimity charge and it was impossible to tell whether all jurors agreed on the same theory of guilt).

tilted the scales against one or more jurors holding out for mercy.*

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE JURY, CONFRONTED WITH GRUESOME COLOR PHOTOGRAPHS EXCLUDED FROM THE GUILT PHASE BECAUSE THEY WERE INFLAMMATORY, IMPOSED THE DEATH SENTENCE ON THE BASIS OF EMOTION, PASSION, OR CAPRICE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Respondent concedes that the photographs were "gross," but argues that they were admitted solely to show the extent of the wounds inflicted, and not to inflame the jury's passions. RB at 18. Respondent once again misstates the record: There was no limiting instruction given to the jury. Moreover, the extent of the wounds inflicted had already been established by expert testimony (TT 293-94), and the prosecutor's comments on the photographs could not but have inflamed the jury's passions (see TT 671-73).

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION INTO EVIDENCE OF PETITIONER'S PRETRIAL STATEMENT TO INVESTIGATORS CONSTITUTED GROSS PROSECUTORIAL MISCONDUCT CREATING SUCH FUNDAMENTAL UNFAIRNESS AS TO DENY PETITIONER DUE PROCESS OF LAW

Respondent totally fails to justify the prosecutor's knowing use at trial of false, inadmissible evidence and unfounded prejudicial allegations. We urged in the Petition that the extended reading of petitioner's pretrial statement constituted

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* See Witherspoon v. Illinois, 391 U.S. 510, 520-23 (1968); Ballew v. Georgia, 435 U.S. 223, 236 (1978) (five-person jury held unconstitutional in part because it diminished the chances of a hung jury, in violation of the Sixth and Fourteenth Amendments).

gross prosecutorial misconduct which "so infected the trial with unfairness as to make the resulting conviction a denial of due process" requiring reversal. Donnelly v. DeChristofero, 416 U.S. 637, 643 (1974). The state's only response is to suggest that the issue of prosecutorial misconduct was not adequately presented below. In fact, the prosecutor's misconduct was properly before the Georgia Supreme Court, and this Court is not precluded from reviewing it.

Petitioner's appointed counsel specifically argued below that "the use of the transcript [was] improper, as edited, when appropriate editing could be done by the District Attorney to exclude inadmissible evidence, including references to prior offenses and potential prior offenses of a similar nature." Appellant's Brief ¶ 8. Thus, petitioner's appointed counsel specifically drew the Georgia Supreme Court's attention to the prosecutor's knowing misuse of inadmissible and prejudicial evidence -- evidence which, in large part, the prosecutor before trial had explicitly agreed not to introduce (TT 168-69). Given petitioner's brief below, respondent's assertion that petitioner's "only concern" before the Georgia Supreme Court was with the inflection of voices on the original taped statement (RB at 20) is simply erroneous; it is true, however, that the Georgia Supreme Court did not specifically address petitioner's claim about the use of the transcript, apparently rejecting it sub silentio.*

* On appeal, appointed counsel abandoned only those objections to the introduction of false evidence that he believed had been corrected on cross examination of the interrogating officer. See Appellant's Brief ¶ 35. The only "corrections" that appointed counsel elicited during cross were that the victim's fingerprints, earring, and blood were not found in petitioner's house, contrary to the officers' accusations during the interrogation. TT 509-10. As demonstrated in the Petition at 66-82, these limited "corrections" did not alleviate the prejudice to petitioner.

Even if appointed counsel had not raised the issue on appeal, the Georgia capital punishment statute calls for plenary appellate review in death penalty cases, and requires the Georgia Supreme Court to insure that the sentence of death is not imposed "under the influence of passion, prejudice, or any other arbitrary factor." Ga. Code Ann. § 27-2537(c)(1). Under this statute, the Georgia Supreme Court has recognized that it has a duty, independent of defense counsel's objections, to review matters such as potentially prejudicial remarks made by the prosecutor. See Hawes v. State, 240 Ga. 327, 336, 240 S.E.2d 833, 840 (1977); accord, Gardner v. Florida, 430 U.S. 349, 361 (1977); Boykin v. Alabama, 395 U.S. 238, 241 (1968). In the instant case, the Georgia Supreme Court rendered a broad holding that "[f]rom a review of the record and transcript, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor." Nelson, 247 Ga. at ___, 274 S.E.2d at 323. This holding is inexplicable in the face of the clear prosecutorial misconduct apparent on the face of the transcript trial record.

Thus the prosecutorial misconduct inherent in the extended use of petitioner's pretrial statement was properly before the court below and is properly before this Court. See Beck v. Alabama, 447 U.S. 625, 630 n.6 (1980); Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973); Vachon v. New Hampshire, 414 U.S. 478 (1974); cf. Supreme Court Rules, Rule 21.1(a).

CONCLUSION

For the reasons stated and under the authorities cited above, petitioner prays that this Court grant his petition for a writ of certiorari.

Dated: August 7, 1981

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